In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1457

ESTATE OF EFFIE KELLS JONES, DECEASED, CITIZENS FIRST NATIONAL BANK OF RIDGEWOOD, ADMINISTRATOR, C.T.A., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and opinion of the United States Tax Court (Pet. App. A2-A17) are reported at 56 T.C. 35. The judgment order of the court of appeals (Pet. App. A1) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 1973. A petition for rehearing was denied on February 23, 1973. The petition for a writ of certiorari was filed on April 26, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals and the Tax Court erred in holding that, under New Jersey law, decedent, at the time of her death, possessed the power to invade trust property received under her husband's will for her own benefit without the requisite limitations, so that her power constituted a general power of appointment under Section 2041(a) of the Internal Revenue Code of 1954.

2. Whether the court of appeals and the Tax Court erred in holding that, at the time of her death, decedent possessed a general power of appointment over the trust property within the scope of Section 2041(a) of the Internal Revenue Code, notwithstanding that the power was exercisable by her only in conjunction with a corporate trustee.

3. Whether Section 2041(a), as applied to the power possessed by decedent at her death in 1965, deprives either the decedent or her estate of property without due process of law in violation of the Fifth Amendment of the Constitution of the United States.

STATUTE AND REGULATIONS INVOLVED

Section 2041(a) of the Internal Revenue Code of 1954 (26 U.S.C.) is reproduced at Pet. App. A18-A21. Section 20.2041-1, Treasury Regulations on Estate Tax (1954 Code) (26 C.F.R.), is reproduced at Pet. App. A22-A24.

STATEMENT

Decedent's husband executed a will on April 29, 1940, which provided that at his death the residue of his estate would go to a trust in which decedent (Effie K. Jones) and her husband's daughter by a previous

marriage (Emma) were given successive life estates. The husband died on July 10, 1949, survived by decedent, Emma and Emma's two children. (Pet. App. A3, A6.) His will, never revised before his death, provided in relevant part that trust income and principal were to be collected, held and distributed during decedent's lifetime as follows (Pet. App. A4-A5):

* * * * *

(a) If my said wife, Effie K. Jones, survive me, to pay to her the net income of my residuary estate or of the trust thereof during her lifetime.

(b) If my said wife, Effie K. Jones, survive me, I authorize and empower my executors during the period of their executorship and my trustees thereafter, *in cases of emergency or in situations affecting her care, maintenance, health, welfare and well-being* to pay over to my said wife (in addition to the said income payments) part or all of the principal of my residuary estate or of the trust thereof, or to use and apply part or all of the principal of my residuary estate, or of the trust thereof, for such purposes. *The judgment and discretion of my executors or trustees as to what constitutes an emergency or any such situation,* and as to the continuation of any emergency or any such situation *and as to how much of the principal of my residuary estate or the trust hereof shall be paid or used therein* and to whom it shall be paid and as to how is shall be used and applied and the purposes for which it shall be paid, used or applied, *shall be final and conclusive* and not subject to inquiry or attack in any court, jurisdiction or proceeding and shall be binding upon all who shall have or may become entitled to any right, title or interest in or to my said residuary

estate or the trust thereof, including any who may be minors or under other legal incapacity or not in being.

In the event of any such payment or use of principal, there shall not be any obligation to refund or reimburse the principal out of the income of my residuary estate or the trust thereof. My corporate executor or trustee shall not be under any duty to see to the application of any moneys so paid to my said wife.

(c) Upon the death of my said wife Effie K. Jones, or upon my death if my said wife Effie K. Jones predecease me, and if my said daughter Emma Louise Rector be then living, to pay to my said daughter Emma Louise Rector during her lifetime the net income of my residuary estate or of the trust thereof *or of so much of my residuary estate or of the trust thereof as may then remain.* [Emphasis added.]

Decedent was named and qualified as co-trustee of this trust, as was a commercial trust company named in the will, and both co-trustees served in that capacity during the remainder of decedent's lifetime. (Pet. App. A7.)

Decedent died on November 11, 1965. No invasions of the trust principal were ever made by the trustees, nor were any releases, renunciations, disclaimers or exercise of any powers of appointment made or effected by the trustees or beneficiaries during the remaining sixteen years of decedent's lifetime. (Pet. App. A7.) Decedent's estate filed a federal estate tax return which did not include the value of the trust assets. The Internal Revenue Service determined that the trust property was includable in the gross estate, and petitioner sought a redetermination in the Tax Court. The Tax

Court entered a decision against petitioner, and the court of appeals affirmed. (Pet. App. A1.)

ARGUMENT

The decision below is correct. There is no conflict of decisions or any other reason for further review by this Court.

1. Under Section 2041(a)(2) of the Internal Revenue Code of 1954, the gross estate for estate tax purposes includes the value of all property "with respect to which the decedent has at the time of his death a general power of appointment created after October 21, 1942 * * *." Section 2041(b)(1)(A) defines "general power of appointment" to include any power which is exercisable by a decedent in favor of himself, his estate, or the creditors of either, including "A power to consume, invade, or appropriate property for the benefit of the decedent" *unless* such power is specifically limited by "an ascertainable standard relating to the health, education, support, or maintenance of the decedent * * *." Where the requisite limiting standards are lacking, a decedent's power to invade the corpus of trust property for his own benefit requires inclusion of the trust assets in the gross estate even though the power was never exercised. *Strite* v. *McGinnes*, 330 F. 2d 234, 238 (C.A. 3), certiorari denied, 379 U.S. 836; *Jenkins* v. *United States*, 428 F. 2d 538 (C.A. 5), certiorari denied, 400 U.S. 829; *Ewing* v. *Rountree*, 346 F. 2d 471 (C.A. 6), certiorari denied, 382 U.S. 918.

The Tax Court, applying New Jersey law, correctly examined the language of decedent's husband's will, and the factual circumstances relevant thereto, to determine the nature of the power he intended to grant to decedent. Because the co-trustees, including decedent, were given complete discretion regarding when invasions

of corpus would be made, and in what amounts, the Tax Court was correct in finding that the necessary limiting standards were lacking, in spite of the general reference in the instrument to "care, maintenance, health, welfare, and well-being."

2. Petitioner argues (Pet. 17-18) that the Commissioner incorrectly determined that decedent's estate should include the trust property merely because she, as life beneficiary, was also a co-trustee. Taxability under Section 2041(a), however, turns not upon whether a decedent was a trustee or a non-trustee beneficiary, but rather upon whether he possessed at his death the exercisable power to invade or consume corpus, or to direct that such invasion or consumption be made, for the benefit of himself, his estate, or his creditors, and it was on the basis of decedent's actual power, not upon her formal role as trustee, that the Commissioner based his position. *Peoples Trust Company of Bergen County* v. *United States,* 412 F. 2d 1156 (C.A. 3); *Ewing* v. *Rountree, supra.* Neither, on the other hand, is it relevant that decedent's power of appointment was exercisable only in conjunction with the corporate co-trustee. Section 2041(b)(1)(C)(ii) of the Code specifically provides that a post-1942 power of appointment exercisable only in conjunction with another is a general power of appointment *unless* that other person has a "substantial interest in the property * * * which is adverse to exercise of the power in favor of the decedent * * *." The latter qualification is not applicable to the corporate co-trustee in this case. Cf. *Reinecke* v. *Smith,* 289 U.S. 172.

3. Petitioner asserts, as it did below (Pet. App. A14-A17), that if decedent did possess a general power of appointment at her death, it was "created on or before October 21, 1942," and since it was not exercised, it should not have been included in decedent's gross

estate according to the law applicable to pre-1942 powers. Under general rules of construction, a will speaks, and powers granted therein take effect, only upon the death of the testator. Congress has created a limited exception to this rule for certain powers taking effect before July 1, 1949, giving them "pre-1942" status, in Section 2041(b)(3), which provides:

> (3) *Date of creation of power.*—For purposes of this section, a power of appointment created by a will executed on or before October 21, 1942, shall be considered a power created on or before such date if the person executing such will dies before July 1, 1949, without having republished such will, by codicil or otherwise, after October 21, 1942.

Decedent's husband executed his will in 1940 and died July 10, 1949. If he had died just ten days earlier, the statutory exception above would have applied and the power would be deemed "created" prior to October 21, 1942, for federal estate tax purposes.

Petitioner claims, however, that it was really the intention of Congress to set a different cutoff date in that provision (namely, July 1, 1951), which would have given the instant power "pre-1942" status. Although the history of this provision is complicated, we do not agree with the petitioner's views of Congress's intention. See H. Rep. No. 327, 82d Cong., 1st Sess., pp. 3, 7; S. Rep. No. 382, 82d Cong., 1st Sess., pp. 2, 8. The short answer to petitioner's argument, however, is that although statutory language should be interpreted in a manner consistent with its context, we know of no case where a court has held that a statutory detail this precise—*i.e.*, a specific date—can be read differently from the way in which the statute is written.

Alternatively, petitioner contends that the cutoff date is arbitrary and results in an unfair application of the statute which deprives decedent of due process. This Court has recently held, however, that a "grandfather clause" in a taxing statute, under which transactions occurring before a certain date retain tax benefits not available with respect to transactions occurring after that date, does not create an arbitrary classification violative of due process requirements if there is any rational justification for the cutoff date. *United States* v. *Maryland Savings-Share Insurance Corp.*, 400 U.S. 4. In this case, when Congress in 1942 enacted the legislation which included property subject to powers of appointment in the taxable estate of the holder of the power, it provided an escape clause with respect to powers created before the date of enactment in order to allow persons who then held these pre-1942 powers to avoid taxation of their estates in the manner set forth in the statute. See Section 2041(a)(1). In subsequent years, Congress extended the grace period during which the pre-1942 powers could be effectively released to July 1, 1951.[1] In 1948, while enacting one of the extensions of this grace period (to July 1, 1949), Congress also enacted the provision at issue here, which extended the date of the testator's death for purposes of determining whether a power created by will is considered created before or after October 21, 1942. Section 2041(b)(3). Petitioner does not appear to question the rational basis either of Congress's allowance of a grace period with respect to the effective release of a pre-1942 power or its provision of a later date of death for purposes of

[1] It is this date which petitioner alleges Congress also intended to use as the cutoff date for the decedent's death in Section 2041(b)(3). See *supra*, p. 7.

defining a pre-1942 power. Instead, petitioner appears simply to regret that the death of the decedent here occurred after the July 1, 1949 cutoff date, so that the power does not come within the scope of the relief provision contained in Section 2041(b)(3). This happenstance, of course, does not render the cutoff date constitutionally invalid. *Maryland Savings-Share Insurance Corp., supra.*

Petitioner also contends that the amendments to the original 1942 legislation enacted when Congress passed the Powers of Appointment Act of 1951, c. 165, 65 Stat. 91, operated retroactively with respect to petitioner in a manner violative of due process requirements. This legislation, however, applied only prospectively to the decedent whose estate is at issue here, because she, as opposed to her husband, died subsequent to 1951. *Ewing* v. *Rountree, supra,* pp. 473-474; see also *Fernandez* v. *Wiener,* 326 U.S. 340, 354-355.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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